Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MARTIN CADILLAC CO., INC.,
Petitioner,

vs.

DIVISION OF LABOR STANDARDS ENFORCEMENT,
DEPARTMENT OF INDUSTRIAL RELATIONS,
STATE OF CALIFORNIA, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FIVE

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did Congress by enacting the exemption set forth in 29 U.S.C. § 213(b)(10)(A) for mechanics employed by retail automobile dealerships from the maximum hour provisions of the Fair Labor Standards Act preempt the application of the maximum hour provisions established by the California Industrial Welfare Commission's wage order 9-90 when applied to automobile mechanics employed by an automobile dealership?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are Petitioner, Martin Cadillac Co., Inc., a California corporation (hereinafter "MARTIN").

MARTIN has no parent company, nor any nonwholly owned subsidiaries.

The Respondents are the Division of Labor Standards Enforcement, Department of Industrial Relations, State of California (hereinafter "IWC") and the People of the State of California (hereinafter "DLSE").

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PETITION FOR WRIT OF CERTIORARI

Martin Cadillac Co., Inc., respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division Five, filed May 20, 1997, following the denial of its petition for review without opinion by the California Supreme Court filed August 13, 1997.

OPINIONS BELOW

The unpublished opinion of the California Court of Appeal, Second Appellate District, Division Five, filed on May 20, 1997, is reproduced herein as Appendix A1-A15. The unpublished opinion of the California Court of Appeal, Second Appellate District, Division Five, filed on July 16, 1996, is reproduced herein as Appendix A16-A26. The order of the California Supreme Court summarily denying the Petitioner's petition for review filed on August 13, 1997, is reproduced herein as Appendix B1. The order of the California Supreme Court transferring the Petitioner's petition for review to the California Court of Appeal, Second Appellate District, Division Five, filed on February 26, 1997, is reproduced herein as Appendix B2-B3. The judgment of the Superior Court of the State of California for the County of Los Angeles of February 16, 1995, granting judgment in favor of the plaintiffs and against the defendant is reproduced herein as Appendix C1-C3. The pertinent constitutional provisions, Article VI, Clause 2, the Supremacy Clause, as well as the statutes involved, 29 U.S.C. § 213(b)(10)(A), and 29 U.S.C. § 218(a), and California Labor Code § 1173, are set forth hereinafter.

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. § 1257 and United States Supreme Court Rule 10(c), this Court has jurisdiction to consider this petition for writ of certiorari to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division Five which was filed May 20, 1997. The California Supreme Court summarily denied the Petitioner's request for review of the judgment of the Court of Appeal of the State of California, Second Appellate District, Division Five on August 13, 1997.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI, Clause 2 of the United States Constitution reads as follows:

> "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

29 U.S.C. § 213(b)(10)(A) reads in pertinent part as follows:

> "**(b) Maximum hour requirements.** The provisions of section 7 [29 USCS § 207] shall not apply with respect to —

> . . . (10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks or farm implements, if he is employed by a non-manufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers . . . ."

29 U.S.C. § 218(a) reads in pertinent part as follows:

> "No provision of this Act . . . or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a . . . maximum workweek lower than the maximum workweek established under this Act . . . ."

California Labor Code § 1173 provides in pertinent part as follows:

> "It shall be the continuing duty of the Industrial Welfare Commission . . . to ascertain the wages paid to all employees in this state, and to ascertain the hours and conditions of labor and employment in the various occupations, trades, and industries in which employees are employed in this state, and to investigate the health, safety and welfare of such employees."

STATEMENT OF THE CASE

The DLSE filed suit against MARTIN for damages for failure to pay overtime compensation for several classifications of MARTIN's employees under provisions established by the California Industrial Welfare Commission in its wage order No. 9-90, and for penalties pursuant to California Labor Code § 210 for failure to pay such overtime compensation. MARTIN claimed, together with other defenses, that the California Industrial Welfare Commission's wage order No. 9-90 when applied to its automobile and bodyshop mechanics was preempted by the provisions of 29 U.S.C. § 213(b)(10)(A). The only issue now raised before this Court is the preemption issue: Did Congress by enacting the exemption set forth in 29 U.S.C. § 213(b)(10)(A) for mechanics employed by automobile dealerships from the maximum hour requirements of the Fair Labor Standards Act (hereinafter "FLSA") preempt the application of the maximum hour provisions established by the California Industrial Welfare Commission's (hereinafter "IWC") wage order No. 9-90 when applied to automobile mechanics employed by an automobile dealership?

PROCEDURAL HISTORY

DLSE, the agency responsible for enforcing the IWC wage orders, initially brought an action against Petitioner in the Superior Court of the State of California for the County of Los Angeles for overtime wages, including penalties, for failure to pay overtime wages to several classifications of employees as required under the applicable wage order of the IWC. Petitioner sought declaratory relief from the application of the wage orders as to its automobile and bodyshop mechanics on

the basis that the maximum hour provisions of the IWC wage order was preempted by the provisions of 29 U.S.C. § 213(b)(10)(A). The trial Court entered judgment in favor of DLSE on all of the issues.

Petitioner appealed to the California Court of Appeal, Second Appellate District, Division Five, and the Court of Appeal upheld the decision of the trial Court. Petitioner then filed a petition for review with the California Supreme Court, and the California Supreme Court transferred the petition for review back to the Court of Appeal with directions to vacate its decision and to reconsider the cause in light of the ruling by the California Supreme Court in *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal.4th 557, 59 Cal.Rptr.2d 186 (1996). The California Court of Appeal, Second Appellate District, Division Five, reconsidered and again upheld the decision of the trial court. Petitioner again petitioned the California Supreme Court for review, and the California Supreme Court denied the petition without an opinion.

REASON WHY THE WRIT SHOULD ISSUE

WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER CONGRESS BY ENACTING 29 U.S.C. § 213(b)(10)(A) EXEMPTING MECHANICS EMPLOYED BY AUTOMOBILE DEALERSHIPS FROM THE FLSA'S MAXIMUM HOUR REQUIREMENTS PREEMPTS APPLICATION OF THE MAXIMUM HOUR REQUIREMENTS OF THE CALIFORNIA INDUSTRIAL WELFARE COMMISSION'S WAGE ORDER NO. 9-90 AS APPLIED TO AUTOMOBILE MECHANICS EMPLOYED BY AN AUTOMOBILE DEALERSHIP?

A. The Automobile Mechanics Employed by MARTIN Are Exempt From the Maximum Hour Provisions of the FLSA by Reason of the Provisions of 29 U.S.C. § 213(b)(10)(A).

29 U.S.C. § 213(b)(10)(A), in substance, exempts salesmen, partsmen, or mechanics (including body and fender mechanics) from the maximum workweek provisions of the FLSA, if they are primarily engaged in the selling or servicing of automobiles, and if they are employed by a non-manufacturing establishment primarily engaged in the business of selling vehicles to ultimate purchasers.

MARTIN is a non-manufacturing automobile dealership primarily engaged in the selling and servicing of automobiles, and its automobile mechanics and body shop mechanics were primarily engaged in servicing

automobiles, and they therefore fall clearly within the parameters of the exemption.

B. Does 29 U.S.C. § 213(b)(10)(A) Preempt the Application of the Maximum Hour Provisions of IWC Wage Order 9-90 when Applied to MARTIN's Employees?

In *Beveridge v. Lewis*, 939 F.2d 859, 862 (9th Cir. 1991) the Court describes the ways in which preemption can occur absent express preemption language:

> "First, Congress may **implicitly** occupy a field through pervasive regulations that leave no room for states to supplement or through the federally sensitive nature of the particular subject area (e.g., foreign affairs). Second, even if it does not implicitly occupy the field, federal law preempts local regulation where there is an **actual conflict.**" (See also footnote 1 (emphasis added).)

In *Tidewater Marine Western, Inc. v. Bradshaw, supra*, 59 Cal.Rptr.2d 186 at 192 (1996) the California Supreme Court stated:

> "In determining whether federal law preempts state law, "our sole task is to ascertain the intent of Congress." . . . Moreover this intent must be "clear and manifest." . . . Preemption may occur in three situations: (1) where the federal law expressly so states, (2) where the federal law is so comprehensive that it leaves " 'no room' for

> supplementary state regulation," or (3) where the federal and state laws "actually conflict [ ]." (Citations omitted.)

In the instant case MARTIN believes that the intent of Congress as shown by the legislative history is clear and unequivocal. In enacting the exemption at issue Congress was not concerned with conflicting regulation by different federal agencies, but was concerned with the incentive method of payment of mechanics, and the irregular hours of their employment when employed by automobile dealerships. It is obvious that Congress intended by the exemption to avoid any disruption of the commission/incentive method of renumeration for such employees, and therefore California's attempt to require overtime payments for such employees is in direct conflict with the intent of Congress.

The legislative history and subsequent case law clearly demonstrate that this exemption was specifically drafted by Congress to address the particular needs of the automobile dealership industry. In *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095, 1098, (5th Cir. 1973) the Court stated:

> "The enactment ... was an implicit recognition by Congress of the incentive method of renumeration for salesmen, partsmen and mechanics employed by an automobile dealership."

The decision of the Court of Appeal (Appendix A9 at n.2) cites from the legislative history:

> "Mr. ANDREWS of North Dakota ... [¶] Mr. Chairman, I want to make absolutely clear cut the intent of Congress as far as the application of this

> act to automobile dealers and commission employees such as salesmen, mechanics, and parts men who work for automobile dealerships. [¶] The need for an exemption from overtime as to salesmen, mechanics and parts men arises out of the traditional commission pay basis for these employees. It is impossible to work these employees on a schedule basis because their ability to earn commissions depends on their availability when sales can be made or repairs are needed. In other words, the employer has no control over the customers' needs and cannot anticipate and schedule working hours as in most other industries. [¶] Mr. BELL. It is my understanding that those employees would be exempt from the overtime feature of the minimum wage. [¶] Mr. ANDREW of North Dakota. *So long as they are* earning *commissions*." (Citation omitted.)

The Court of Appeal concludes (Appendix A9) that: "The legislative history indicates that the FLSA exemption for automobile mechanics was intended to **preserve** the commission pay system prevalent in the automobile industry." (emphasis added).

In *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095, 1098 (5th Cir. 1973), n.4, the Court also cites from the legislative history:

> "Mr. ANDREWS of North Dakota . . . I want to make sure that the intent of Congress is that those who are primarily retail dealers engaged

> in selling Ford and Chevrolet automobiles have this exemption for their commission employees such as parts men, and salesmen, and mechanics. Mr. DENT. The answer is still "Yes" as far as I can tell." (Citation omitted.)

Contrary to the conclusion of the Court of Appeal (Appendix A10) that: "Congress was interested only in assuring that *the FLSA* did not interfere with the commission system," it is MARTIN's position that by enacting this exemption, it was the clear intent of Congress to preserve the traditional incentive pay plans for mechanics employed by automobile dealerships. Congress implicitly occupied this field and IWC Order No. 9-90 clearly conflicts with Congressional intent.

There is nothing in the legislative history to support the conclusion of the Court of Appeal.

Moreover, Congress could not intend to preserve the traditional incentive pay plans for such employees, if it also intended to grant the states carte blanche to disrupt those incentive methods of payment.

C. The Effect of the Savings Clause.

It is MARTIN's position that in light of the legislative history with respect to this exemption, the reliance by the Court of Appeal on the FLSA's saving clause is misplaced.

29 U.S.C. § 218(a) reads in pertinent part as follows:

> "No provision of this chapter or of any order thereunder shall excuse noncompliance with any . . . State law or municipal ordinance establishing . . . a maximum workweek lower than the maximum workweek established under this chapter . . . ."

The IWC did not establish a maximum workweek lower than that established by the FLSA. The DLSE simply ignored the automobile mechanics exemption, and applied IWC Order No. 9-90 to MARTIN's exempt employees.

The legislative history of the automobile mechanic' exemption indicates that it was enacted by Congress to preserve the traditional incentive method of renumeration for automobile dealership mechanics; and if that was the intent of Congress, the application of California's overtime laws in the instant case conflicts with the Congressional intent. Nothing in the legislative history supports the conclusion that Congress intended to limit the exemption only to the application of the provisions of the FLSA.

Thus, it is MARTIN's position that the legislative history of the automobile mechanics exemption requires a more restrictive interpretation of the savings clause than that of the California Court of Appeal, and the cases it relied on (Appendix A8-A9). The intent of Congress to preserve the commission pay system prevalent in the automobile industry could not be effectuated if the states were allowed to disrupt that system.

Finally, Petitioner believes that this issue presents a case of first impression. To the best of the undersigned's knowledge, this Court has not interpreted the intent of Congress when it enacted the exemption set forth in 29 U.S.C. § 213(b)(10)(A), and whether the legislative history implicitly preempts the states from applying conflicting overtime provisions.

CONCLUSION

Petitioner therefore respectfully urges this Court to issue a Writ of Certiorari on the question presented.

Dated: November 10, 1997.

Respectfully submitted,

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APPENDIX A

NOT TO BE PUBLISHED
IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

Court of Appeal - Second Dist.
FILED
MAY 20 1997
Joseph A. Lane Clerk

Deputy Clerk

DIVISION OF LABOR STANDARDS ENFORCEMENT,
Plaintiff, Cross-defendant and Respondent,
v.
MARTIN CADILLAC CO., INC.,
Defendant, Cross-complainant and Appellant.

B092166
(Super. Ct. No. SC019953)

APPEAL from a judgment of the Superior Court of Los Angeles County. Irving Shimer, Judge. Affirmed.

Carol J. Cloutier/Salgado and Walter Cortright Appling for Defendant, Cross-complainant and Appellant.

William A. Reich and Barbara J. Ferguson for Plaintiff, Cross-defendant and Respondent.

Defendant, cross-complainant and appellant Martin Cadillac Co., Inc. appeals from the judgment entered in favor of plaintiff, cross-defendant and respondent Division of Labor Standards Enforcement (DLSE). Martin contends: (1) the federal Fair Labor Standards Act of 1938 (29 U.S.C. § 207) (the FLSA) preempts California's overtime laws with respect to automobile mechanics; (2) Martin paid its body shop mechanics sufficient overtime compensation; and (3) the trial court erred by finding Martin was subject to penalties for willful conduct. We affirm.

PROCEDURAL BACKGROUND

The DLSE filed a complaint against Martin on September 28, 1992, for failure to pay overtime compensation and for the imposition of penalties pursuant to Labor Code section 210. On November 15, 1992, Martin filed an answer and a cross-complaint for declaratory and injunctive relief. The DLSE filed its answer to the cross-complaint on December 4, 1992.

The parties stipulated to the relevant facts and the trial court entered judgment for the DLSE on the complaint and the cross-complaint. Martin filed a timely notice of appeal. On appeal, Martin argued that the FLSA preempted California's overtime laws, its body shop mechanics were sufficiently compensated for overtime based on their hourly rate without including "bonuses," and it should not be subject to penalties for willfully failing to pay overtime. We affirmed the judgment.

On October 2, 1996, the Supreme Court granted Martin's petition for review. Martin Requested Supreme Court review on the grounds that (1) the FLSA preempted California's Industrial Welfare Commission (IWC) Order No. 9-90, and (2) the inclusion of

nondiscretionary bonuses in calculating overtime compensation as required by the DLSE Operations and Procedures Manual was not reasonable in this case. On February 26, 1997, the Supreme Court vacated this court's decision and remanded the matter to us for further consideration in light of its decision in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557.

FACTS

Martin is an automobile dealership primarily engaged in the business of selling and servicing automobiles. The DLSE began its investigation of Martin's wage practices after Larry King, a former automobile mechanic at Martin, filed a complaint for overtime compensation in January 1991. The DLSE reviewed Martin's payroll records and directed Martin to conduct a self-audit of its books and records according to the DLSE methods.

Martin paid its body shop mechanics, automobile mechanics and polishers on an incentive basis. Automobile industry guides provide time allotments for various services or repairs, known as the "flat rate" or "flag rate." To calculate wages for automobile mechanics, Martin multiplied the flat rate for a particular service (hours) times Martin's hourly rate for the customer, regardless of the amount of time the automobile mechanic actually spent on the repair or service. The automobile mechanics received a percentage of that flat rate calculation, Body shop mechanics received an hourly rate, one and one-half times the hourly rate for overtime and a bonus based on either the flat rate hours or hours negotiated for repairs with insurance companies. The more efficient a body shop mechanics was, the greater his or her bonus. Polishers were paid a fixed

rate for each vehicle polished. Calculated according to the DLSE methods, Martin's self-audit demonstrated that these employees were entitled to additional overtime compensation.

DISCUSSION

Standard of Review

> "Appellant attacks the trial court's judgment as unsupported by the evidence or as erroneous as a matter of law. . . . [A]n appellate court must accept as true all evidence tending to establish the correctness of the judgment, taking into account all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. (*Roberts v. Salot* (1958) 166 Cal.App.2d 294, 296 [ ].) . . . Thus, the judgment of the trial court is presumed to be correct. All presumptions not contradicted by the record on appeal are indulged to support the judgment, and the appellant has the burden to affirmatively show, based on the record, the trial court's commission of reversible error. (See, e.g., *Walling v. Kimball* (1941) 17 Cal.2d 364, 373 [ ]; *Ellis v. Roshei Corp.* (1983) 143 Cal.App.3d 642, fn. 2[ ].)
>
> "In determining whether there is any substantial evidence to sustain the judgment, the appellate court will look only at the evidence supporting the

> prevailing party and will disregard the contrary showing; the evidence is not to be weighed by the appellate court: 'All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity, to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed.' (*Estate of Teel* (1944) 25 Cal.2d 520, 527 [ ].)" (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 872.)

Industrial Welfare Commission

The IWC is authorized to develop wage orders regulating wages, hours and conditions of employment for employees throughout the state. (Lab. Code, § 1173.) IWC Order No. 9-90 governs employees in the transportation industry and provides in pertinent part:

> "3. HOURS AND DAYS OF WORK
> "(A) The following overtime provisions are applicable to employees eighteen (18) years of age or over and to employees sixteen (16) or seventeen (17) years of age who are not required by law to attend school: such employees shall not be employed more than eight (8) hours in any workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1 1/2) times such employee's regular rate of pay for all hours worked over forty

(40) hours in the workweek. Employment beyond eight (8) hours in any workday is permissible provided the employee is compensated for such overtime at not less than:

"(1) One and one-half (1 1/2) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) day of work; and

"(2) Double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) day of work in any workweek."

The DLSE is the agency authorized to administer, interpret and enforce the IWC wage orders. (Lab. Code, §§ 61, 1193.5.)

Tidewater Marine Western, Inc. v. Bradshaw,
14 Cal.4th 557

Plaintiffs Tidewater Marine Western, Inc. and Zapata Gulf Pacific, Inc. (collectively Tidewater) were maritime firms which transported workers and supplies from the California coast to oil-drilling platforms located in the Santa Barbara Channel. They sought an injunction against defendant DLSE, headed by defendant Labor Commissioner Victoria Bradshaw, to prevent enforcement of IWC Orders Nos. 4-89 and 9-90 governing overtime pay. Originally, the DLSE had determined

whether the IWC wage orders applied to employees in the maritime industry on a case-by-case basis. In 1989, the DLSE incorporated its overtime policy in an internally prepared "Operations and Procedures Manual."

Tidewater argued that the FLSA's express exemption for sailors preempted application of California's IWC wage orders to maritime employees. The Supreme Court found that Congress did not intend the FLSA's sailor exemption to preempt state law and the IWC wage orders were valid. (*Tidewater Marine Western, Inc. v. Bradshaw, supra*, 14 Cal.4th at pp. 568, 577.) However, the Supreme Court determined that the DLSE's written policy in the Operations and Procedures Manual construing the IWC wage orders to apply to maritime employees was void because the policy was a regulation that had not been adopted in accordance with the Administrative Procedures Act (APA) (Gov. Code, § 11340 et seq.). Without giving any weight to the DLSE's interpretation, the Supreme Court found that the IWC wage orders applied to Tidewater's maritime employees. (*Tidewater Marine Western, Inc. v. Bradshaw, supra*, 14 Cal.4th at pp. 577-579.)

Preemption

The FLSA sets forth minimum wage and maximum hour conditions for employees. (29 U.S.C. § 201 et seq.) The FLSA exempts mechanics who primarily service automobiles from the federal minimum wage and maximum hour requirements if the mechanics are employed by a non-manufacturing establishment primarily engaged in selling automobiles. (*Id.*, § 213(b)(10)(A).) Martin contends that the FLSA provision exempting mechanics from the federal wage requirements preempts application of California's overtime provisions contained in IWC

Order No. 9-90.[1] We disagree.

A state law is preempted by federal law in three situations: (1) if the federal law expressly provides for preemption; (2) if the federal law is so comprehensive as to leave no room for supplementary state regulation; or (3) if the state law actually conflicts with federal law. (*Tidewater Marine Western, Inc. v. Bradshaw*, *supra*, 14 Cal. 4th Cal. at p. 567.) "In determining whether federal law preempts state law, 'our sole task is to ascertain the intent of Congress.' [Citation.] Moreover, this intent must be 'clear and manifest.' [Citation.]" (*Ibid.*)

The FLSA does not expressly provide for preemption, nor is it so comprehensive that it leaves no room for supplementary state regulation. "Here, not only does the FLSA leave 'room' for supplementary state regulation of overtime, the FLSA expressly indicates that it does not preempt this regulation. The FLSA includes a 'savings clause,' which provides: 'No provision of this chapter or of any order thereunder shall excuse noncompliance with any . . . State law or municipal ordinance establishing . . . a maximum workweek lower than the maximum workweek established under this chapter . . .'. (29 U.S.C. § 218(a).) The federal courts that have addressed this question have interpreted this savings clause as expressly permitting states to regulate overtime wages. (See, e.g., *Overnite Transp. Co. v. Tianti* (2d Cir. (1991) 926 F.2d 220, 222 ['state overtime wage law is not preempted by . . . the FLSA']; *Pacific Merchant Shipping Ass'n v. Aubry* [9th Cir. 1990] 918 F.2d [1409,] 1422 ['Congress has specifically allowed states to enforce overtimes laws more generous than the FLSA,' citing the savings clause]; *Pettis Moving Co., Inc. v. Roberts* (2d Cir. 1986) 784 F.2d 439, 441 [savings

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[1] Martin does not raise any issues concerning exemption or preemption with respect to polishers.

clause 'explicitly permits states to set more stringent overtime provisions than the FLSA']; and *Williams v. W. M. A. Transit Company* (D.C. Cir. 1972) 472 F.2d 1258, 1261 [savings clause 'permits state laws to operate even as to workers exempt from FLSA'].)" (*Tidewater Marine Western, Inc. v. Bradshaw, supra*, 14 Cal.4th at p. 567.)

"Moreover, no provision of the FLSA 'actually conflicts' with California law." (*Tidewater Marine Western, Inc. v. Bradshaw, supra*, 14 Cal.4th at p. 568.) The FLSA does not expressly preclude states from regulating the overtime wages of automobile mechanics, and the legislative history of the FLSA does not suggest an implicit preclusion of state regulation of the compensation of automobile mechanics. The legislative history indicates that the FLSA exemption for automobile mechanics was intended to preserve the commission pay system prevalent in the automobile industry.[2] The congressional record clearly states that Congress intended to exempt automobile salespersons and mechanics working on a commission basis because their hours

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[2] The congressional record states: "Mr. ANDREWS of North Dakota. . . . [¶] Mr. Chairman, I want to make absolutely clear cut the intent of Congress as far as the application of this act to automobile dealers and commission employees such as salesmen, mechanics, and parts men who work for automobile dealerships. [¶] The need for an exemption from overtime as to salesmen, mechanics, and parts men arises out of the traditional commission pay basis for these employees. It is impossible to successfully work these employees on a schedule basis because their ability to earn commissions depends on their availability when sales can be made or repairs are needed. In other words, the employer has no control over the customers' needs and cannot anticipate and schedule working hours as in most other industries. [¶] Mr. BELL. It is my understanding that those employees would be exempt from the overtime feature of the minimum wage. [¶] Mr. ANDREWS of North Dakota. *So long as they are earning commissions.*" (112 Cong. Rec. (89th Cong. 2nd Sess. 1966) H1289, italics added.)

could not be scheduled consistently. Automobile mechanics compensated under a "flat rate" method are not "commission" employees under the common sense definition of the term. (*Keyes Motors, Inc. v. Division of Labor Standards Enforcement* (1987) 197 Cal.App.3d 557, 564.) Moreover, the legislative history does not address whether states may include mechanics under more stringent overtime regulations. Congress was interested only in assuring that *the FLSA* did not interfere with the commission system.

Based on the foregoing authorities, the plain meaning of the FLSA, the FLSA savings clause, and the absence of a clear indication from Congress to preempt the state's power, we conclude that the FLSA exemption for automobile mechanics found at 29 United States Code section 213(b)(10)(A) does not preclude enforcement of California's overtime provisions with respect to automobile mechanics. Thus, Martin's automobile and body shop mechanics are subject to the overtime provisions of IWC Order No. 9-90.

Calculation of Overtime Compensation

Martin pays its body shop mechanics overtime at the rate of one and one-half times their regular hourly rate, not including bonuses. Martin contends that it paid its body shop mechanics the overtime required by IWC Order No. 9-90. Pursuant to IWC Order No. 9-90, overtime wages are calculated based on the number of hours an employee works and the employee's regular rate of pay. IWC Order No. 9-90 does not define the term "regular rate of pay." Martin argues that its body shop mechanics are paid one and one-half times their regular rate of pay as overtime. Specifically, Martin argues that incentive bonuses should be excluded from

the regular rate of pay in calculating overtime compensation for body shop mechanics.[3] We disagree.

The DLSE Operations and Procedures Manual section 10.29 includes non discretionary "bonuses" as part of an employee's regular rate of pay. Written policies of the DLSE which interpret the IWC wage orders and are applied generally to a class of similar cases, and which are not merely restatements summarizing the DLSE's prior decisions or advice letters, are regulations within the meaning of the APA and must be adopted in accordance with the APA. (*Tidewater Marine Western, Inc. v. Bradshaw, supra*, 14 Cal.4th at p. 572.) The DLSE's written interpretations which constitute regulations not adopted in accordance with the APA are void and not entitled to any deference. (*Id.* at pp. 576-577.) Martin has never contended that the DLSE policy including nondiscretionary bonuses in the regular rate of pay was not adopted in accordance with the APA. Nor is there any evidence in the record that the DLSE's interpretation was not adopted in accordance with the APA. However, in light of the Supreme Court's determination in *Tidewater* that the policy in issue in that case, as expressed in the DLSE Operations and Procedures Manual, was intended as a rule of general application and void because DLSE failed to follow APA procedures, we will give no weight to the DLSE's interpretation of the wage order and determine whether the interpretation is correct. (*Id.* at p. 572, 577.)

"California courts have recognized that California's wage laws are patterned on federal statutes and that the authorities construing those federal statutes provide persuasive guidance to state courts." (*Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 Cal.

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[3] Martin does not raise any issues with respect to the calculation of overtime compensation for automobile mechanics or polishers.

App.3d 16, 31.) The FLSA contains the term "regular rate" and defines the term, subject to certain exclusions, as including "all remuneration for employment paid to, or on behalf of, the employee ...." (29 U.S.C. § 207(e).) The Department of Labor enforces the FLSA (*id.*, §204) and has issued official interpretations which have authoritative force (29 C.F.R. § 778.4; *Bumpus v. Continental Baking Co.* (6th Cir. 1941) 124 F.3d 549, 552.) The Department of Labor excludes the following types of bonuses from the "regular rate": discretionary bonuses, gifts, contributions to welfare plans and payments to certain other benefit plans. (29 C.F.R. § 778.208.) "Bonuses which do not qualify for exclusion from the regular rate as one of these types must be totaled in with other earnings to determine the regular rate on which overtime pay must be based." (*Ibid.*) The Department of Labor has specifically declared that incentive bonuses based on piece rates or production are not excluded from the "regular rate." (*Id.*, §§ 778.110, 778.111.)

A reasonable interpretation of the term "regular rate" includes nondiscretionary incentive bonuses. Employees who receive an incentive-based component of their pay in addition to their guaranteed hourly base rate receive a greater regular rate than the minimum base rate. If the employees received only nondiscretionary incentive bonuses or commissions, their regular rate would be determined by calculating those wages as an hourly rate. It follows that nondiscretionary bonuses which form only a part of the normal weekly income must also be part of the regular rate. Nondiscretionary incentive bonuses do not escape the force of California's wage laws merely because they are paid in addition to a minimum hourly pay or characterized as bonuses. To conclude that only the minimum hourly rate constitutes the regular rate would permit evasion of the plain intent

of the IWC wage order. All wages could be structured as an hourly minimum wage and a mandatory bonus so that employers would pay only the minimum in overtime compensation.

Based on a reasonable interpretation of the term "regular rate of pay" which gives effect to the legislative intent and persuasive federal authorities, we conclude that nondiscretionary incentive pay is includible in calculating overtime compensation. Martin's overtime compensation calculations improperly excluded nondiscretionary bonuses based on the flat rates from the body shop mechanics' total wages. The bonuses were includible as part of the employees' total wages. Martin's self-audit reflects the proper method for calculating overtime compensation and the trial court correctly ordered Martin to make payment in accordance with those calculations.

Penalties Under Labor Code Section 210

The DLSE contends that Martin is liable for penalties under Labor Code section 210 for intentional failure to pay overtime compensation, whether or not Martin believed its method for calculating overtime compensation complied with state and federal law. We agree.

Labor Code section 210 provides that an employer who fails to pay wages in accordance with Labor Code section 204 shall be subject to a civil penalty as follows: "(a) For any initial violation, fifty dollars ($50) for each failure to pay each employee. (b) For each subsequent violation, or any willful or intentional violation, one hundred dollars ($100) for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld." In the context of an employer's failure to make payments under the Labor Code, "[t]he term 'willful' . . . does not mean that the refusal to pay wages

must necessarily be based on a deliberate evil purpose to defraud workmen of wages which the employer knows to be due, in order to subject him to the penalty. In the case of *May v. New York [M.] Picture Corp.* [(1920)], 45 Cal.App. 396, 404[], it was held that the term 'wilful in its ordinary use, merely means that one intentionally fails or refuses to perform an act which is required to be done. It is said in this regard: [¶] 'In civil cases the word "wilful" as ordinarily used in courts of law, does not necessarily imply anything blameable . . ., but merely that the thing done or omitted to be done, was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent." ' " (*Davis v. Morris* (1940) 37 Cal.App.2d 269,274.) Ignorance of the law does not excuse a defendant or create a defense to a charge of willfulness. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 395-396.)

Although Martin may have believed its method for computing overtime was lawful, Martin knew the amount of overtime compensation being paid and intentionally paid overtime in an amount less than that required by law. The amount paid was insufficient, and therefore, Martin willfully violated the overtime compensation law. Martin's good faith belief that its methods were lawful does not excuse its intentional failure to pay employees the requisite overtime compensation. Since Martin's failure to pay its employees proper compensation was intentional, the trial court properly assessed penalties against it under Labor Code section 210.

DISPOSITION

The judgment is affirmed. The Division of Labor Standards Enforcement is awarded its costs on appeal.

NOT TO BE PUBLISHED.

GRIGNON, Acting P.J.

We concur:

ARMSTRONG, J.

GODOY PEREZ, J.

NOT TO BE PUBLISHED
IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

Court of Appeal - Second Dist.
FILED
JUL 16 1996
Joseph A. Lane Clerk

Deputy Clerk

DIVISION OF LABORS STANDARDS ENFORCEMENT et al.,
Plaintiffs, Cross-defendants and Respondent,
v.
MARTIN CADILLAC CO., INC.,
Defendant, Cross-complainant and Appellant.

B092166
(Super. Ct. No. SC019953)

APPEAL from a judgment of the Superior Court of Los Angeles County. Irving Shimer, Judge. Affirmed.

Carol J. Cloutier/Salgado and Walter Cortright Appling for Defendant, Cross-complainant and Appellant.

Barbara J. Ferguson for Plaintiff, Cross-defendant and Respondent.

Defendant, cross-complainant and appellant Martin Cadillac Co., Inc. appeals from the judgment entered after a court trial in favor of plaintiff, cross-defendant and respondent Division of Labor Standards Enforcement (DLSE). The trial court determined that Martin owed its mechanics overtime compensation and was subject to statutory penalties under Labor Code section 210 for willful violations of California's minimum wage laws. Martin contends that the federal Fair Labor Standards Act of 1938 (29 U.S.C. § 207) (FLSA) preempts California's minimum wage laws with respect to mechanics, it paid its employees properly and it could not be subject to penalties for willful conduct. We affirm.

PROCEDURAL BACKGROUND

The DLSE filed a complaint against Martin on September 28, 1992, alleging causes of action for failure to pay overtime compensation and for penalties pursuant to Labor Code section 210. On November 15, 1992, Martin filed its answer and a cross-complaint for declaratory and injunctive relief. The DLSE filed its answer to the cross-complaint on December 4, 1992.

The parties stipulated to the relevant facts and the trial court entered judgment for the DLSE on the complaint and the cross-complaint.

FACTS

Martin is an automobile dealership primarily engaged in the business of selling and servicing automobiles. The DLSE began its investigation of Martin's wage practices after Larry King, a former auto mechanic at Martin, filed a complaint for overtime compensation in

January 1991. The DLSE reviewed Martin's payroll records and directed Martin to conduct a self-audit of its books and records according to DLSE methods.

Martin paid its body shop mechanics, automobile mechanics and polishers on an incentive basis. Automobile industry guides provide time allotments for various services or repairs, known as the "flat rate" or "flag rate." To calculate wages for automobile mechanics, Martin multiplied the flat rate for a particular service (hours) times Martin's hourly rate for the customer, regardless of the amount of time the automobile mechanic actually spent on the repair or service. The automobile mechanic received a percentage of that flat rate calculation. Body shop mechanics received an hourly rate, time and one-half for overtime and a bonus based on either the flat rate hours or hours negotiated for repairs with insurance companies. The more efficient a body shop mechanic was, the greater his or her bonus. Polishers were paid a fixed rate for each vehicle polished. Calculated according to DLSE methods, Martin's self-audit demonstrated that these employees were entitled to overtime compensation.

DISCUSSION

Standard of Review

"Appellant attacks the trial court's judgment as unsupported by the evidence or as erroneous as a matter of law. But an appellate court must accept as true all evidence tending to establish the correctness of the judgment, taking into account all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. (*Roberts v. Salot* (1958) 166 Cal.App.2d 294, 296 [ ].) Every substantial conflict in the testimony is to be resolved in favor of the judgment.

(*Bancroft-Whitney Co. v. McHugh* (1913) 166 Cal. 140, 142 [ ].) Thus, the judgment of the trial court is presumed to be correct. All presumptions not contradicted by the record on appeal are indulged to support the judgment, and the appellant has the burden to affirmatively show, based on the record, the trial court's commission of reversible error. (See, e.g., *Walling v. Kimball* (1941) 17 Cal.2d 364, 373 [ ]; *Ellis v. Roshei Corp.* (1983) 143 Cal.App.3d 642, 645, fn. 2[ ].)

"In determining whether there is any substantial evidence to sustain the judgment, the appellate court will look only at the evidence supporting the prevailing party and will disregard the contrary showing; the evidence is not to be weighed by the appellate court: 'All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity, to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed.' (*Estate of Teel* (1944) 25 Cal.2d 520, 527 [ ].)" (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 872.)

Industrial Welfare Commission

The California Industrial Welfare Commission (IWC) is authorized to develop wage orders regulating wages, hours and conditions of employment for employees throughout the state. (Lab. Code, § 1173.) IWC wage order No. 9-90 provides in pertinent part:

> "3. HOURS AND DAYS OF WORK
>
> "(A) The following overtime provisions are applicable to employees eighteen (18) years of age or over and to employees sixteen (16) or seven-

> teen (17) years of age who are not required by law to attend school: such employees shall not be employed more than eight (8) hours in any workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1 1/2) times such employee's regular rate of pay for all hours worked over forty (40) hours in the workweek. Employment beyond eight (8) hours in any workday is permissible provided the employee is compensated for such overtime at not less than:
>
> "(1) One and one-half (1 1/2) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) day of the work; and
>
> "(2) Double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) day of work in any workweek."

The DLSE is the agency authorized to administer, interpret and enforce IWC wage orders. (Lab. Code, §§ 61, 1193.5; *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, 249.) "The DLSE's interpretation is entitled to great weight and under established principles of statutory construction, unless it is clearly unreasonable, it will be upheld."

(*Skyline Homes, Inc. v. Department of Industrial Relations, supra*, 165 Cal.App.3d at p. 249.)

Preemption

Martin contends that the FLSA exemption for mechanics from federal minimum wage requirements preempts application of the minimum wage provisions contained in IWC Order No. 9-90. We disagree.

The FLSA sets forth minimum wage and maximum hour conditions for employees. (29 U.S.C. § 201 et seq.) The FLSA exempts mechanics who primarily service automobiles from the federal minimum wage and maximum hour requirements if the mechanics are employed by a non-manufacturing establishment primarily engaged in selling automobiles. (*Id.* at § 213(b)(10)(A).) The FLSA, however, allows states to enact more stringent wage and hour regulations: "No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter . . . ." (*Id.* at § 218(a).)

A state law is preempted by federal law if Congress expressly provides for preemption, or if Congress enacts comprehensive regulation so as to leave no room for state regulation, or if the state law conflicts with federal law. (*Pacific Merchant Shipping Ass'n v. Aubry* (9th Cir. 1990) 918 F.2d 1409, 1415.) To determine whether a federal statute preempts state law, we must ascertain the intent of Congress. (*Ibid.*) The historic police powers of the state to regulate the employment relationship are not superseded by federal legislation unless

Congress clearly intended to preempt state law. (*Id.* at p. 1416.) "Federal regulations recognize that various state and local laws will require payment of minimum hourly, daily or weekly wages different from minimums set forth in the Labor Standards Act, and provide that where state or local laws provide greater protection to the employee they shall be taken to override the provisions of the FLSA." (*Skyline Homes, Inc. v. Department of Industrial Relations, supra*, 165 Cal.App.3d at p. 251; 29 C.F.R. § 778.5.) Nothing in the legislative history suggests that by exempting mechanics from the FLSA's overtime provisions, Congress intended to preclude application of state overtime provisions to mechanics.[1]

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[1] Legislative history reveals that the FLSA exemption for mechanics was intended to preserve the commission pay system prevalent in the automobile industry. The congressional record states: "Mr. ANDREWS of North Dakota. . . . [¶] Mr. Chairman, I want to make absolutely clear cut the intent of Congress as far as the application of this act to automobile dealers and commission employees such as salesmen, mechanics, and parts men who work for automobile dealerships. [¶] The need for an exemption from overtime as to salesmen, mechanics, and parts men arises out of the traditional commission pay basis for these employees. It is impossible to successfully work these employees on a schedule basis because their ability to earn commissions depends on their availability when sales can be made or repairs are needed. In other words, the employer has no control over the customers' needs and cannot anticipate and schedule working hours as in most other industries. [¶] Mr. BELL. It is my understanding that those employees would be exempt from the overtime feature of the minimum wage. [¶] Mr. ANDREWS of North Dakota. So long as they are earning commissions." (112 Cong. Rec. (89th Cong. 2nd Sess. 1966) H1289.) Although the legislative discussion and the exemption itself apply to automobile mechanics, the policy behind the exemption is to protect the commission earnings system. After careful analysis of the "flat rate" method of compensating automobile mechanics, the appellate court held in *Keyes Motor, Inc. v. Division of Labor Standards Enforcement* (1987) 197 Cal.App.3d 557 that automobile mechanics compensated in this manner are not commission employees.

(Cf. *Pacific Merchant Shipping Ass'n v. Aubry, supra,* 918 F.2d at pp. 1417-1418.)

Related case authority supports the conclusion that the exemption of mechanics from the FLSA's overtime provisions does not automatically preempt California from applying its overtime compensation laws to mechanics. (*Pacific Merchant Shipping Ass'n v. Aubry, supra,* 918 F.2d at pp. 1415-1418 [marine workers]; *Plouffe v Farm & Ranch Equip. Co.* (1977) 570 P.2d 1106 [farm equipment mechanics]; *Pettis Moving Co., Inc. v. Roberts* (2d Cir. 1986) 784 F.2d 439 [interstate motor carriers]; *Williams v. W.M.A. Transit Company* (D.C. Cir. 1972) 472 F.2d 1258 [interstate motor carriers].) In order for there to be preemption, Congress must clearly have intended to supersede traditional powers of the state. (*Pacific Merchant Shipping Ass'n v. Aubry, supra,* 918 F.2d at p. 1419.) In enacting the FLSA, Congress expressly permitted states to enforce more stringent overtime provisions.

Based on these authorities, the plain meaning of the FLSA, 29 United States Code section 218(a), which permits additional state regulation, and the absence of a clear indication from Congress to preempt the state's power, we find that the FLSA, 29 United States Code section 213(b)(10)(A), does not preclude enforcement of California's overtime provisions with respect to the FLSA-exempt mechanics.

Calculation of Overtime Compensation

Martin contends that its body shop mechanics were properly compensated for overtime based on the body

shop mechanics' hourly rate.[2] We disagree.

Overtime wages are calculated based on an employee's "regular rate" of pay. (*Skyline Homes, Inc. v. Department of Industrial Relations, supra*, 165 Cal. App.3d at p. 245.) To determine an employee's regular rate of pay, the amount of the employee's total weekly earnings is divided by forty hours. (*Ibid.*) The employee's earnings include nondiscretionary "bonuses" when the bonus is based upon hours worked, production or efficiency. (DLSE Operations and Procedure, § 10.29.) Hours worked in excess of 40 hours in one week or in excess of 8 hours in one day must be compensated according to the overtime rate. (*Skyline Homes, Inc. v. Department of Industrial Relations, supra*, 165 Cal-.App.3d at p. 248.)

Martin's overtime compensation calculations improperly excluded from the body shop mechanics' total wages the bonuses earned based on the flat rates. The bonuses were nondiscretionary amounts intended to increase efficiency and production and were, therefore, includible a part of the employees' total wages. The proper calculation for body shop mechanics was to divide the total wages earned in one week, including the "flat" percentage amount of any bonuses, by 40 hours to produce the employee's regular rate of pay. Martin's self-audit reflects the proper method for calculating overtime compensation and the trial court correctly ordered Martin to make payment in accordance with those calculations.

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[2] Martin does not raise any issues with respect to the calculation of overtime compensation for automobile mechanics or polishers.

Penalties Under Labor Code Section 210

The DLSE contends that Martin is liable for penalties under Labor Code section 210 for intentional failure to pay overtime compensation, whether or not Martin believed its method for calculating overtime compensation complied with state and federal law. We agree.

Labor Code section 210 provides that an employer who fails to pay wages in accordance with Labor Code section 204 shall be subject to a civil penalty as follows: "(a) For any initial violation, fifty dollars ($50) for each failure to pay each employee. (b) For each subsequent violation, or any willful or intentional violation, one hundred dollars ($100) for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld." In the context of an employer's failure to make payments under the Labor Code, "[t]he term 'willful' . . . does not mean that the refusal to pay wages must necessarily be based on a deliberate evil purpose to defraud workmen of wages which the employer knows to be due, in order to subject him to the penalty. In the case of *May v. New York [M.] Picture Corp.* [(1920)] 45 Cal.App. 396, 404 [ ], it was held that the term 'wilful' in its ordinary use, merely means that one intentionally fails or refuses to perform an act which is required to be done. It is said in this regard: [¶] 'In civil cases the word "wilful" as ordinarily used in courts of law, does not necessarily imply anything blameable . . ., but merely that the thing done or omitted to be done, was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent." ' " (*Davis v. Morris* (1940) 37 Cal.App.2d 269, 274.) Ignorance of the law does not excuse a defendant or create a defense to a charge of willfulness. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 395-396.)

Although Martin believed its method for computing overtime was lawful, Martin knew the amount of overtime compensation being paid and did not intend to make the overtime payments which were required by law. The amount paid was insufficient, and therefore, Martin willfully violated the overtime compensation law. Martin's good faith belief that its methods were lawful does not excuse its intentional failure to pay employees the requisite overtime compensation. Since Martin's failure to pay its employees proper compensation was intentional, the trial court properly assessed penalties against it under Labor Code section 210.

DISPOSITION

The judgment is affirmed. The Division of Labor Standards Enforcement is awarded its costs on appeal.

NOT TO BE PUBLISHED.

GRIGNON, Acting P.J.

We concur:

ARMSTRONG, J.

GODOY PEREZ, J.

APPENDIX B

Second Appellate District, Division Five
No. B092166

S055719

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
AUG 13 1997
Robert Wandruff Clerk

Deputy

DIVISION OF LABORS STANDARDS ENFORCEMENT et al.,
Respondent

v.

INCORPORATED MARTIN CADILLAC CO.,
Appellant

Appellant's petition for review DENIED.
The request for an order directing publication of the opinion is denied.

GEORGE
Chief Justice

Second Appellate District, Division Five
No. B092166

S055719
IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
FEB 26 1997
Robert Wandruff Clerk

Deputy

DIVISION OF LABOR STANDARDS ENFORCEMENT et al.,
Respondents

v.

MARTIN CADILLAC CO., INC.,
Appellant

The above-entitled review is hereby transferred to the Court of Appeal, Second Appellate District, Division Five, with directions to vacate its decision and to reconsider the cause in light of *Tidewater v. Bradshaw* (1996) 14 Cal.4th 557.

George
Chief Justice

Mosk
Associate Justice

Kennard
Associate Justice

Baxter
Associate Justice

Werdegar
Associate Justice

Chin
Associate Justice

Brown
Associate Justice

APPENDIX C

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
By: MICHAEL S. VILLENEUVE, State Bar #80785
245 W. Broadway, Suite 450
Long Beach, California 90802-4445
Telephone No.: (310) 590-5461
Attorney for Plaintiffs

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ORIGINAL FILED
FEB 16 1995

DIVISION OF LABOR STANDARDS ENFORCEMENT, Department of Industrial Relations, State of California, and THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiffs,
v.
MARTIN CADILLAC CO., INC., a California corporation; and DOES 1 through 10, inclusive,
Defendants.

MARTIN CADILLAC CO., INC., a California corporation,
Cross-Complainant,
v.
DIVISION OF LABOR STANDARDS ENFORCEMENT, Department of Industrial Relations, State of California, and THE PEOPLE OF THE STATE OF CALIFORNIA, and DOES 1 through 10, inclusive,
Cross-Defendants.

Case No. SC019953
JUDGMENT

The Court having entered its Order for Entry of Judgment on January 9, 1995, and counsel for plaintiffs having timely filed his memorandum of costs and declaration regarding attorney's fees, and no timely motion to tax having been filed,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of plaintiffs, DIVISION OF LABOR STANDARDS ENFORCEMENT, Department of Industrial Relations, State of California, and THE PEOPLE OF THE STATE OF CALIFORNIA, in the principal amount of $260,742.28, plus attorney's fees of $14, 312.50 for grand total of $275,054.78.

DATED: FEB 16 1995

IRVING SHIMER
JUDGE OF SUPERIOR COURT

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT

CERTIFICATION OF SERVICE BY MAIL
(C.C.P. 1013a) OR CERTIFIED MAIL

I, REYNALDO S. TUYOR, do hereby certify that I am a resident of or employed in the county of Los Angeles (County where mailing occurs), over 18 years of age, not a party to the within action, and that I am employed at and my business address is:

245 W. Broadway, Suite 450
Long Beach, CA 90802

On February 21, 1995, I served the within JUDGMENT by placing a true copy thereof in an envelope addressed as follows:

CAROL J. CLOUTIER/SALGADO, ESQ.
WALTER CORTRIGHT APPLING, ESQ.
333 NORTH SANTA ANITA AVE., SUITE 2
ARCADIA, CA 91006-2863

and then sealing the envelope and, with postage and certified mail fees (if applicable) thereon fully prepaid, depositing it in the United States mail in this city by

[XX] Ordinary first class mail
[ ] Certified mail

I certify under penalty of perjury that the foregoing is true and correct.

Executed on February 21, 1995, at Long Beach, California.

/s/ Reynaldo S. Tuyor

State Case No. LB0558